

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JUN 6 1977

UNITED STATES OF AMERICA

v

KENNETH L. BROWN

PETITIONER

APPELLANT

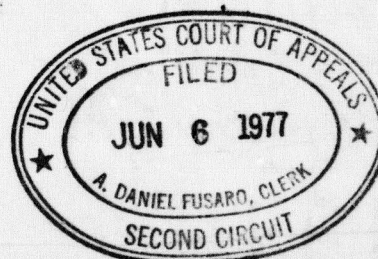
Docket No. 77 - 2021

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellants Brief + Appendix

Kenneth L. Brown Pro-Se
Lewisburg, Pa. 17837



PAGINATION AS IN ORIGINAL COPY

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STATUTES

18 U.S.C. 2
18 U.S.C. 371
18 U.S.C. 2114
18 U.S.C. 500

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Kenneth L. Brown

Petitioner

Appellant

United States Of America

Respondant

Appellee

Brief For Appellant

Statement of Issues Presented For Review

- 1- Was the appellant, Kenneth L. Brown, the victim of an unconstitutional arrest as a result of which he was charged with possession of stolen property. (Count 4 of the indictment). Subsequently charging appellant with conspiracy to commit offenses against the United States of America. (count 1 robbery of a postal office with a dangerous weapon (counts 2 & 3) ?
- 2- Did circumstances sufficiently justify forceful entry into the premises of 22 W. 12th Street New York City, New York without notification of authority, purpose or intent by officers and postal inspectors acting under the color of the United States flag whereas acts lead to the appellant's conviction of counts 1,2,3, and 4.
- 3- Were officers justified in searching premises (building and apartment) without a valid search warrant.

PRELIMINARY STATEMENT

Appellant, Kenneth L. Brown, was arrested on May 1, 1976. An indictment charging him with conspiracy to commit offense against the United States (count 1), robbery of a post office with a dangerous weapon (count 2 & 3) and possession of stolen money orders (count 4) was filed against him on May 13, 1976.

Appellant pleaded not guilty on May 20, 1976. Following a seven day trial the jury found the appellant guilty on all four counts. On September 21, 1976, a judgement was filed sentencing the appellant to a term of imprisonment of three (3) years on count one and a five year term on count four to run consecutively. The appellant was sentenced to a suspended term of twenty-five years on counts two and three, to be followed by a period of one day of unsupervised probation.

This is an appeal from that conviction.

STATEMENT OF FACTS

On May 1, 1976, at approximately 7:45 A.M. the Hell Gate Branch of the United States Postal Service was robbed allegedly by three armed but unidentified men. A large quantity of blank postal money orders a validating machine and plates, and various metal post office boxes containing post office stamps and other property were removed from the premises during the course of the robbery.

Several hours later Katherine Stubbington and postal inspector Monroe claim to have gained admittance to an apartment at 22 W. 121st St. while acting in an undercover capacity during which time the both offer conflicting testimony pertaining to the contents of the apartment. (fruits of the crime from the robbery), and their location. Both claimed to engage in conversation with appellant Kenneth L. Brown, Sylvia Diaz (an indicted co-conspirator whose case was severed), and Don Daniels, also a co-conspirator. Monroe and Stubbington left apartment at approximately 3:15 P.M. Several hours later agents acting on description, (two males black and one pregnant female) furnished by Inspector Monroe arrested the defendants Kenneth Brown, Eric Daniels, and Don Daniels in an automobile legally parked on same block of premises 22 W. 121st St. Defendants were removed from automobile at gun point by officers. Subsequently and before receiving a search warrant agents forced their way into the building and broke into the apartment (one room and kitchenette with bath attached). Upon entering Inspector Slavinsky searched premises, closet and bathroom, allegedly in pursuit of Sylvia Diaz. After determining that apartment was unoccupied officers remained inside until search warrant arrived at approximately 9:15 P.M. During their stay in apartment officers used the telephone on premises to call and communicate their actions to Assistant United States Attorney William Kellerher and Inspector Monroe. During the course of the subsequent trial Inspector Monroe under direct testimony alleges that he saw money orders and machine on table while in the apartment, and removed items roughly 9:15 P.M. pursuant to a valid search warrant. However, Inspector Slavinsky and Macklin conflict this testimony

stating that they saw no money order machine on table. Further Macklin testifies that he did not recall a table period. Note we are making reference to a one room kitchenette with bath attached apartment.

POINT I

ARREST WAS INVALID WHEREAS ARRESTING OFFICERS
LACKED " PROBABLE CAUSE" OR " REASONABLE GROUNDS"
TO ARREST DEFENDANT.

In Wrights Vol. I. Section 77, Rule 5, requires that their be probable cause for an officer to arrest without a warrant. It further requires that an arrest made without a warrant at a time when the officer does not have probable cause for such an arrest nothing that happens there after can make the arrest lawful. Henry -v- United States, 1959, ' S. Ct. 168 170, 361, U.S. 98, 100, 4 L. Ed. 2d 134, Gatlin v U.S., C.A. 1963, 326 F. 2d 666, 117 U.S. App. D.C. 123.

The arresting officer's basis for the arrest of defendant was on the merit of description reading " two black males and one pregnant female ", also black. The brother officer was not present at time or place of arrest. Incidentally, information furnished by brother agent stated that these individuals were to be found in one of several apartments at the premises of 22 W. 121st St. New York City, New York.

The defendant Brown was arrested in an automobile parked in the same street in the company of two males, of which neither appeared to be pregnant, although both may be considered black. The vehicle was legally parked and was not in violation of any law.

The fact that the " brother agent " was not present during the arrest throws a larger overcast of the validity of an arrest founded on such vague and prejudicial circumstances.

POINT II

FORCIBLE ENTRY INTO PREMISES WITHOUT NOTIFICATION OF AUTHORITY PURPOSE OR INTENT ABSENT EXIGENT CIRCUMSTANCES IS UNREASONABLE.

Provisions of the Fourth Amendment of the Constitution require that police Officers must give notice of their identity and purpose before attempting to enter private premises. Violation of this statute, absent exigent circumstances, renders any following search and seizure unreasonable. The statute also applies to forcible entries with a valid search warrant. Com. v. Clemson, Pa. Super. 1975, 338 F. 2d 649. Machado v. Superior Court Stanislaus County Cal. App. 1975, 119 Cal. Rptr. 344. State v. Michell, N.C. App. 1974, 207 S.E. 2d 263.

Arresting officer make it obviously a fact to the court that entry into the premises of 22 W. 121st St. was by force, " use of a battering ram ", without notification of authority, purpose or intent. Action of entry was taken while defendants and co-defendants were in the custody of same officers. Upon entry into basement apartment one room kitchenette with bath attached and one single means of entry and departure premises was found to be empty.

Proof that exigent circumstances existed is the burden of the prosecution to establish. In so far it has yet to be satisfactorily proven. Black v. Amico, D.C. N.Y. 1974 387 F. Supp. 88.

POINT III

SEARCH OF PREMISES PRIOR TO SECURING A VALID SEARCH WARRANT
WAS THE RESULT OF UNCONSTITUTIONAL SEARCH AND SEIZURE

Under the Forth Amendment of the Constitution " Proscription against unreasonable searchers and seizures designed to prevent random and unjustified interference with private citizens whether the interference is denominated an arrest, investicatory detention, or field interrogation. " People v. Cantor, 1975, 324 N.E. 2d 872, 36 N.Y. 2d 106.

After officers entered premises at approximately 5:15 P.M. of 22 W. 121st St. by use of a battering ram officers admit entering and searching the premises in addition to using the phone to contact U.S. Assistant Attorney and brother agents. They then sealed themselves inside of apartment and waited several hours (5) before securing a search warrant after the search had allegedly tak n place according to officers testimony.

CONCLUSION

The Appellants conviction should be reversed.

Kenneth L. Brown
Kenneth L. Brown

Kenneth L. Brown Pro-Se
Appellant

Sworn Before Me This

^{26th}
~~26th~~ Day of May 1977.

[Signature]

Parole Officer - Authorized by
Act of July 7, 1955 to admin-
ister oaths (18 U.S.C.4604).

DIST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	S	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR. NUMBER
208-01	76 4774	10 28 76	2	510	1					0864		76 4774

PLAINTIFFS

DEFENDANTS GOETTEL, J.

BROWN, KENNETH L.

UNITED STATES OF AMERICA

PETITIONER

RESPONDENT

CAUSE

28 U.S.C Sec. 2255-motion to vacate sentence

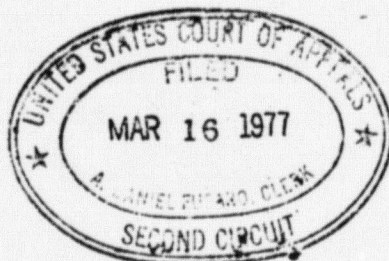
ATTORNEYS

PRO SE

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~~100/727/244~~
NYC

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☒ CHECK
HERE
IF CASE WAS
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FILING FEES PAID

DATE

RECEIPT NUMBER

C.D. NUMBER

OCT 28 1976

VFP

STATISTICAL CARDS

CARD

DATE MAILED

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77-2021

DATE	NR.	PROCEEDINGS	PAGE -1-
10-28-76	-1-	Filed motion to vacate sentence	
10-28-76	-2-	Filed ORDER permitting petitioner to proceed in forma pauperis—Duffy, J.	
1-22-76	-3-	Filed notice of change of address by pltf.	
12-22-76	-4-	Filed endorsement These Petitioners, convicted in the same criminal action(76 CR 476) and having received the same sentence, both moved to vacate or set aside their convictions. Since this final ground for the motion must fail, both motions are denied and both actions dismissed—Goettel, J. m/n pro-se	
2-8-77	5	Filed petitioner's notice of appeal from decision and order of Judge Goettel, date December 21(filed December 22) dismissing his motion to vacate sentence.	
2-8-77	6	Filed memo. endorsed on Pro Se Clerk's letter of 2-2-77: "No objection to movant proceeding in forma pauperis...." Goettel J.	

A TRUE COPY
RAYMOND E. BURGHARDT
By

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E N D O R S E M E N T

KENNETH L. BROWN v. UNITED STATES OF AMERICA, 76 Civ. 4774
(GLG) Pro Se

DON DANIELS v. UNITED STATES OF AMERICA, 76 Civ. 4775
(GLG) Pro Se

These Petitioners, convicted in the same criminal action, (76 Cr. 476) and having received the same sentence, both moved to vacate or set aside their convictions under Title 28 U.S.C. 2255. Since the petitions are essentially identical and the considerations are the same, they will be considered jointly.

Petitioner Daniels had earlier made application for Writ of Habeas Corpus pursuant to 28 U.S.C. §2241. While it is questionable whether relief was procedurally available under that section prior to the making of the motion to vacate the sentence, these niceties are not being considered and all of the grounds and information set forth in both applications are hereby considered jointly.

Since the convictions are presently on appeal, the Court could, in its discretion, decline to entertain these Section 2255 motions at this time. United States v. Deutsch, 321 F. Supp. 1356, 1357 (S.D.N.Y.), aff'd 451 F.2d 98 (2d Cir. 1971), cert. denied, 404 U.S. 1019 (1972). However, since the motions can be easily disposed of they will be considered at this time.

The first two grounds, unlawful arrest and unconstitutional and illegal search and seizure, were the subject of a pre-trial motion to suppress which was denied. No new facts are brought forth and there is no reason for reconsidering the earlier determination.

The third ground is the alleged suppression of evidence by the United States Attorney's office. It is contended that they failed to make available as "3500 material" reports from the New York City Police Emergency Service Unit. No police witnesses were called at trial and, therefore, there were no statutory grounds for producing such reports. Moreover,

PROFILE

DEC 23 1976

the Assistant United States Attorney in charge of the case states that he never had in his possession such reports. Consequently, that branch of the motion must be denied.

The final ground for each motion is the alleged denial of effective assistance of counsel. Petitioner Brown contends that he was not permitted to call his attorney until the morning after his arrest and that his attorney was lacking in federal experience. No post-arrest statements were offered against defendant Brown and, therefore, even assuming his claim concerning the inability to call his attorney is true, no prejudice has been demonstrated. As to the attorney's lack of federal experience it should be noted that he was originally retained counsel. After he had commenced representation of the defendant, and when funds were unavailable to pay him, he was appointed under the Criminal Justice Act. However, he had been selected by the defendant. Moreover, his performance in court was not ineffective.

Defendant Daniels contends that his assigned counsel failed to make certain discovery motions and to conduct certain investigations along with other purported disclosures. The discovery motions were unnecessary since, pursuant to the usual practice in this district, voluntary discovery was made by the prosecution. The alleged "disclosures" concerned Daniels post trial, pre-sentence motion to have his assigned counsel relieved and to allow him to represent himself. They were inconsequential and had no bearing whatever upon either conviction or sentence. Having observed his counsel throughout the trial and at sentencing (Joyce K. Barlow), it is the Court's opinion that she was extremely competent in every aspect of the defense. Since this final ground for the motion must fail, both motions are denied and both actions dismissed.

SO ORDERED:

Dated: New York, N.Y.,
December 21, 1976.


U.S.D.J.

